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IN THE

**Supreme Court of the United States**

**OCTOBER TERM 1947**

**EMILE C. de STUBNER, *Petitioner,***

**vs.**

**UNITED CARBON COMPANY and  
UNITED CARBON COMPANY, INC.  
(MARYLAND), *Respondents.***

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOURTH CIRCUIT**

**and**

**BRIEF IN SUPPORT THEREOF**

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*To the Honorable Fred M. Vinson, Chief Justice of the  
United States, and the Associate Justices of The  
Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the decretal judgment of the Circuit Court of Appeals for the Fourth Circuit rendered and entered on the 25th day of September, 1947; the order denying petition for rehearing on December 8, 1947, and the mandate which issued five days thereafter.

**OPINION BELOW**

The opinion of the Circuit Court of Appeals, filed September 25, 1947, is reported in 163 F. 2d 735.

## **BASIS OF JURISDICTION**

Jurisdiction is invoked under Judicial Code as amended April 20, 1940, 54 Statute 143; 28 U. S. C. A. Sec. 41 sub. (1) and sub. (1) (b).

## **QUESTIONS PRESENTED**

The fundamental questions presented in this petition are:

(a) The finding and holding of the Circuit Court of Appeals, affirming the District Court, that the agreements of August 18, 1936, (dated July 31, 1936) were not intended to and did not cover the field of dustless carbon black. (Opinion, page 741, bottom, right column.)

(b) Was petitioner in possession of information which enabled the respondents to secure the dustless carbon black patents or to engage in the successful manufacture of the product? (The opinion says the petitioner never possessed this information, page 745.)

(c) May the respondent, United Carbon Company, Inc., be confirmed in its adjudged right to use the inventions set forth in the "fingerprint" patents and application, free of the claims and rights of petitioner as herein asserted? (The opinion says petitioner is not entitled to an assignment of the patents or to royalty upon the use of the processes therein, page 745.)

## **SUMMARY STATEMENT**

The essential facts are contained in the bill of complaint, with exhibits thereto, and the joint and separate answer of the defendants. (Printed Appendix Vol. I, page 1 et seq.)

The petitioner was born in Switzerland and came to this country in 1915 and for many years, until his association with defendants in 1934, resided in New York where he practiced his profession of physicist as a consultant and

was publicly recognized long prior to his association with the defendants as having made outstanding contributions in the field of pigment dispersions. (App. Vol. III, pages 1223, 1224.)

Petitioner came in contact with respondent, United Carbon Company, and its president, Oscar Nelson, in the fall of 1933 through Charles A. Greene. (Plff.'s Ex. 2, App. Vol. III, pages 1050, 1051.) As the result of this contact, petitioner in 1934, at the request of Oscar Nelson as President of United Carbon Company, one of the three large companies controlling the carbon black business in the United States, conferred in Charleston, West Virginia, with said Nelson and his chief engineer.

### Option

Petitioner entered into an option agreement with United Carbon Company on May 1, 1934, by the terms of which petitioner, as inventor, patentee and sole owner of a number of patents and applications relating to apparatus, methods, processes and products pertaining to the art of pigment dispersion, did grant unto United Carbon Company the option or right to have exclusive license, with exclusive right to sub-license, for the United States and all other countries, all said patents and inventions which were to be transferred to a company to be organized as Vacuum Microd Process, Inc.; such license to extend for the term of any and all such letters patent, less five days. The option provided that the transferee company was to act and function as a holding company and licensor to manufacturers in pertinent branches of industry. The option agreement further provided, *inter alia*, that it was the intent and purpose of the parties to demonstrate the practicability and commercial possibilities of the processes and products of the optionor; to this end optionee agreed to furnish the funds and facilities necessary for a demonstration at a location to be designated by it. During such period of



demonstration the optionor was to give such aid and perform such services in connection therewith as should be required by the optionee.

The option agreement further provided, in detail, the stock interest optionor was to receive in licensee company to be formed. There is also contained in this option agreement a list of patents issued, the date and subject matter of such patents, as also a list of patents granted but not issued and applications pending. The term of this option was for one year, provided optionee should not be in default in the performance of its obligations in respect to furnishing the facilities and funds therein set forth. On March 25, 1935, the optionee caused the United Carbon Company, Inc. to be formed and incorporated under the laws of the State of Maryland and transferred to it the option rights of United Carbon Company. The transferee company was organized with the same officers and directors as United Carbon Company, which owned all its capital stock, and used the same offices. The first extension was for a period of six months, expiring November 1, 1935. Further extensions were granted to July 31, 1936.

#### **License Agreement Between Petitioner and Microid Process, Inc.**

Petitioner and Microid Process, Inc., incorporated for the purpose, on July 31, 1936, entered into a license agreement by the terms of which Petitioner granted to Microid a non-assignable (except a license to United Carbon Company, Inc., for the treatment of carbon black as therein provided) sole and exclusive license to *use*, together with the sole and exclusive right to sub-license the *use* of the inventions, improvements or discoveries disclosed in the patents or applications therefor, fully set forth in an attached schedule, and all inventions, discoveries or improvements relating to any idea, machine, apparatus, formula, fact or *process* pertinent or valuable to the science and



art of pigment dispersion of whatever kind and nature theretofore or thereafter made, discovered, compiled or developed by licensor or with respect to which he has a right to grant a license.

Microid Process, Inc., the licensee, was organized with authorized capital stock of nine thousand (9,000) shares of common stock, without par value, divided into Class "A" stock in the amount of three thousand (3,000) shares and class "B" stock in the amount of six thousand (6,000) shares, each having the same voting privileges. The Class "A" stock was issued to petitioner and the Class "B" stock to respondent, United Carbon Company, Inc. The Company had three (3) directors composed of petitioner and two selected by said respondent. The licensee was never solvent.

This license agreement provides for its termination, and when terminated, all licenses lawfully granted shall remain in force and effect and all royalties and license fees reserved to Microid shall become the property of plaintiff who shall become licensor. This license agreement was cancelled by decretal judgment, because of the insolvency of Microid, effective August 1, 1942, in the case of *de Stubner v. Microid Process, Inc.*, 124 W. Va. 591, 21 S. E. 2d 154.

#### **License Agreement From Microid to United Carbon Company, Inc.**

By license agreement dated July 31, 1936, Microid Process, Inc., granted to United Carbon Company, Inc. (referred to therein as "Microid" and "United") a license to use and to sub-license others to use any and all patents owned by Microid or under which Microid had a right to grant such license,

"for the treatment of carbon black or other pigments produced by the combustion or decomposition of hydro-carbon gases, petroleum or petroleum prod-

ucts and lamp black, throughout the world, under all the inventions and discoveries, *whether patented or unpatented, relating to such use*, and including the patents and inventions more particularly set forth in the said schedule of patents, applications and inventions attached hereto."

Microid agrees to instruct United in the use of such inventions. United accepted the license agreement subject to all its terms and conditions and agrees not to use said inventions or patents or grant sub-licenses relating thereto except in accordance with the license agreement; agrees to disclose fully and promptly to Microid all inventions, improvements, secret processes, formulas, or discoveries made, acquired or used by licensee and relating to or useful in the exercise of the license granted,

"and at the request of Microid agrees to assign or cause to be assigned to it and does hereby assign to it all such rights as licensee has or may have a right to acquire in said inventions, improvements, secret processes, formulas or discoveries, \* \* \*"

#### **Agreement Between de Stubner and United Carbon Company, Inc.**

Plaintiff and United Carbon Company, Inc. entered into an agreement dated July 31, 1936, which said agreement was fully set forth in, and adopted as a part of the by-laws of Microid Process, Inc. on said date.

In the minutes of the first meeting of the stockholders of Microid Process, Inc. held on July 31, 1936, there appears this recital:

"There were presented to the meeting for discussion drafts of three (3) agreements in writing, each dated July 31, 1936, one agreement being a license from Emile C. de Stubner to Microid Process, Inc., one being a license from Microid Process, Inc. to United Carbon Company, Inc., and one being an agreement

between Emile C. de Stubner and United Carbon Company, Inc."

A resolution is thereupon adopted approving:

"the plan of organization set forth in the three (3) agreements dated July 31, 1936, this day presented to and *discussed* at this meeting, and that the Board of Directors take action in conformity therewith."

Thereupon follows the by-laws which were adopted and in Article VII of which is contained the agreement between de Stubner and United Carbon Company, Inc. which is preceded by a recital that previous to the incorporation the agreement had been entered into and

"is hereby adopted as a part of these by-laws insofar as the same prescribed methods for the conduct of the business of this corporation and defines the rights, duties and obligations of its stockholders, officers, agents and employees, and in case of conflict between any provision of these by-laws and any provision of said agreement the latter shall prevail so long as it remains in effect."

The agreement refers to the first party as "de Stubner" and United Carbon Company, Inc. as "United" and recites the option of May 1, 1934, from de Stubner to United Carbon Company to which United, Inc. has succeeded and its election to exercise the same; recites that the parties thereto have caused the incorporation and organization of Microid Process, Inc. with the amount and character of stock, and the execution of the license agreement between de Stubner and Microid.

The schedule of the de Stubner patents, applications and inventions, including the disclosures docketed but not filed, with numbers and titles thereto are the same as contained in the agreements filed with the pleadings in this case.

Petitioner's patent attorney from 1932 to March, 1939, was Arthur M. Smith of Detroit, who became a member of the firm of Dike, Calver & Gray in about 1933, with offices in Boston and Detroit. Petitioner had Smith come to Charleston, West Virginia, in February, 1935, when as petitioner's attorney he first contacted the officers of the respondents. Petitioner was then engaged in preparing a report requested by Nelson on November 13, 1934, and wanted Smith's aid in its preparation. (This report is Plff.'s Ex. 114, App. Vol. III, page 1125.)

Petitioner's patent attorney, Arthur M. Smith, later presented to him a bound book containing certain of the de Stubner disclosures as set out in the schedule of same attached to the license agreements, which bound book is filed as Plff.'s Ex. 68, App Vol. I, page 288. Said disclosures contained a writing which is in part as follows:

"August 14, 1936

Memorandum

Re: Disclosures in E926

Title: Manufacture of Dustless Carbon Black

This information was disclosed by Mr. de Stubner during my visit in Charleston on July 30, 1936, as a part of the general discussion of the dustless carbon black situation. \* \* \*

In the schedule of patents, applications and inventions in the license agreements are the following:

"A. Issued U. S. Letters Patent

• • •

5. 1,866,017

Title, Pigments, Process of Making Same

Date, July 5, 1932 (Applied for September 23, 1926)

• • •

7. 1,955,738  
Title, Method of Dispersing Pigments  
Date, April 24, 1934 (Applied for January 18, 1929)

8. 1,965,764  
Title, Method of Processing Finely Divided Solids  
Date, July 10, 1934 (Applied for February 1, 1932)

• • •

#### B. Pending U. S. Patent Applications

• • •

8. 729,913  
Title, Processing Pigment Dispersions  
(Applied for June 9, 1934—now U. S. Patent No. 2,086,997 issued July 13, 1937)

• • •

10. 757,469  
Title, Dispersion Method and Device  
Utilizing Pressure (Filed December 14, 1934)

• • •

#### C. Docketed but not filed

1. C510  
Title, Utilization of Dustless Carbon Black

• • •

The petitioner was engaged during the option period of two years and three months in demonstrating on pilot plant scale in the pilot plant at Charleston the practicability and commercial possibilities of his inventions as contained in his patents, applications, and disclosures set forth in the option which were thereafter carried into the license agreements.

During this option period petitioner carried the financial burden of maintaining and developing his patent estate in the U. S. and foreign countries.

A. M. Smith of Detroit, Michigan, was engaged by petitioner in 1932 as his patent attorney and counsel, and continued as such until March, 1939, when he terminated his employment with petitioner.

Said Smith in May, 1937, accepted employment from the respondents and prepared for them the applications for the patents for the manufacture of dustless carbon black. (App. Vol. II, 865 bot., opinion page 745.)

These patents designated in this record as "the fingerprint patents" were issued to employees of respondents who operate thereunder in the manufacture and sale of dustless carbon black.

The application which did not ripen into a patent is found disclosed in U. S. 2,213,056 issued to Skoog and Bradford August 27, 1940, and applied for April 29, 1938. Said application Ser. No. 205,139 was likewise filed April 29, 1938, in the names of Hanson and Skoog. This application is for the treatment of carbon black by a wet and dry method.

No assignment of this nor the other "fingerprint patents" has been made to the licensor as required by the license agreement.

### **Reason for Granting the Petition**

The Circuit Court of Appeals for the Fourth Circuit has decided:

(A) That the agreements, including the option, were not intended to and did not cover the field of dustless carbon black, thus ignoring the language of the agreements and the acts of the parties thereunder.

(B) It is also decided that petitioner "was not in possession of information which enabled the defendants to secure the dustless carbon black patents or to engage in the successful manufacture of the product."

(C) It is also decided that petitioner "can lay no claim to novelty."

Thus is ignored the intent of the parties as expressed in the language of the agreements, and also deciding, in effect, that petitioner is not to be hereafter protected in the rights granted him by the U. S. Patent Office, whereas, no such question could be properly determined in this suit which is predicated upon contract, and not infringement. (Alan N. Mann, Orig. Tr., page 1347.)

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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---

**BRIEF IN SUPPORT OF PETITION**

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The Circuit Court of Appeals, as also the District Court, gives consideration to the language of the option and testimony with reference thereto in arriving at the intention of the parties and as a justification for the conclusion reached that the agreements were not intended to and did not cover the field of dustless carbon black, notwithstanding the language of the agreements and the conduct of the parties with reference thereto.

The opinion of the C. C. A. says *inter alia*:

“But we do not find that the attorney disclosed to the defendants information regarding said processes and apparatus which had been entrusted to him in confidence by the plaintiff. On the contrary, the proof convinces us as we have shown that the plaintiff was working in the laboratory in the field of pigment dispersion and was not in possession of information which enabled the defendants to secure

the dustless carbon patents or to engage in the successful manufacture of the product. In short, we do not find that the attorney violated his professional duty to the plaintiff by accepting employment from the defendants in a different field." (Opinion, page 745.)

In the joint and separate answer, duly verified, of the respondents filed in the State Court (Defts.' Ex. No. 247 in this case) is found the following averment:

"It is true that on or about the month of December, 1933, plaintiff was brought in contact with certain officers, agents and representatives of respondent United Carbon Company; that said respondent was greatly interested in the patents and processes of the plaintiff and desired to meet the plaintiff; that thereafter the plaintiff had conferences and correspondence with said respondent's representatives, including its President, Oscar Nelson, its general counsel, Osman E. Swartz, and Walter Grote of its technical staff and possibly other representatives of said respondent."

Only the U. S. 1,866,017, Defts.' Ex. 10, issued July 5, 1932, (App. Vol. IV, page 1432) for "Pigments and Process of Making Same," could excite this *great* interest because in this patent the petitioner discloses his process for making pigment pulps, without any addition of other substances which might interfere with the purity of the pigment, thus advancing the science and art of pigment dispersions, which by conventional methods usually used dispersing agents or materials which left the treated pigment in an impure state, particularly in the case of carbon black.

The claims of this patent are based, *inter alia*, on the disclosure:

"\* \* \*, and the fine precipitated form of the pigment in the form and fineness produced by the precipitation in the first instance, is preserved and

maintained without the same undergoing any treatment tending to destroy or alter such fineness." (App. Vol. IV, page 1433, right lines 71 to 79.)

"The treatment of the finely divided pigment by water, either when said pigment is produced by precipitation from solutions, or when the pigment is otherwise produced in finely divided form \* \* \*." (Id. 1434, right 122, 125.)

The language: "or when the pigment is otherwise produced in finely divided form" includes carbon black produced by combustion. The petitioner's treatment is that of "wetting" as he states in the paragraph following (Id. page 1435 top) without the aid of any other substance ever being employed so that wetted carbon black consisted solely of carbon black and water but no other substance, no dispersing agents. "Wetting" is the impregnating of the surfaces of each of the solid particles. (App. Vol. III, page 1128.)

A photostatic copy was introduced as Defts.' Ex. No. 10 and attention is called to the marking on page 3 bottom thereon showing the emphasis placed on pigments produced *otherwise* than by precipitation from solutions.

It clearly appears that on November 8, 1933, the respondents were interested in the treatment of carbon black by "wetting" for the purpose of obtaining it as granular carbon black which must be pure, i.e., without being admixed with binders or similar agents. (Defts.' Ex. 195, App. Vol. III, pages 1051-1052.)

In said Defts.' Ex. 247 in paragraph 4 it is further averred:

"Respondents say that it is true that said respondent was interested in said inventions, patents and processes so far as they related to the field of pigment dispersion, and that it is true that said respondent made some study of said inventions, pat-

ents and processes and of the plaintiff personally and that said respondent entered into negotiations with the plaintiff and subsequently entered into a temporary option agreement with plaintiff, as alleged in said paragraph '4'."

**IT WAS THE DE STUBNER PIONEER INVENTION OF LEAVING PIGMENTS IN THEIR PURE STATE AS PRODUCED IN THE FIRST INSTANCE WHICH GREATLY INTERESTED RESPONDENT, UNITED CARBON COMPANY, AS ALSO THE PIGMENT CONSUMING INDUSTRY**

In contradistinction to conventional methods which incorporated by grinding pigments directly into vehicles of of the ultimate or consumer product, always using a dispersing agent, de Stubner prepared the pigment *separately* without any dispersing agent and *before* it reached an ultimate dispersion medium by making intermediary dispersions of preliminarily, initially wetted pigments which he wetted with a selected wetting agent, but without dispersing agents. de Stubner obtained his results by controlling the consistency of proportions of wetting agent to pure pigment for making his pulps. Such initial, intermediary dispersions are *ex necessitate*, related to ultimate dispersion media, as for example, wetted carbon black inclusive of wet carbon black aggregates which finally will be dispersed in rubber by coaction of the ultimate dispersion medium with the preliminarily prepared pigment of his intermediary dispersions.

David D. Cochrane, an expert witness for respondents, testifies:

"\* \* \* but a good carbon black and rubber mix is a dispersion." (Original Tr. page 1105)

Petitioner's pioneer invention was published as early as March 13, 1930, in the "Paint, Oil and Chemical Review" (Plff.'s Ex. 61) and is as follows:

"Pigmented Lacquers Without Grinding Introduced. A new method for incorporating pigment without grinding in the manufacture of lacquer enamels has been invented by Dr. E. C. de Stubner, an engineer of Swiss descent who has been responsible for a number of important inventions in varnish and allied fields. The underlying basis of this useful invention consists in bringing together *pulp* colors or rather pigments in a *water-wet* condition with nitrocellulose in the same condition and displacing the undesirable water in both products by dehydration methods similar to those used by the nitrocellulose industry.

"This product then, namely, alcohol-wet pigmented nitrocellulose, may readily be incorporated into a lacquer without any grinding ever having been done, either in the production of the pigment or the lacquer. Furthermore, inasmuch as the *original state of subdivision of the pigment has been maintained* throughout, a dispersion in the finished lacquer is obtained which is said to be far superior to any made by ordinary grinding methods.

"Dr. de Stubner features the point that modern theorists state there is no such thing as grinding; that it simply consists of properly 'wetting' *each pigment particle*.

"This process has come into commercial being and a concern is manufacturing 'pigmented nitrocellulose paste', a product made by dissolving the pigmented nitrocellulose in ethyl acetate or other suitable solvent.

"A number of prominent lacquer manufacturers have tested and are now using the new product with marked success.

"The features of the new pigmented paste which appeal particularly to the lacquer industry are its adaptability which is due to the *elimination of*

*undesirable constituents*, its speed and economy of production, which is obtained by direct mixing with clear lacquer and which requires only a few minutes and finally the excellent quality of the lacquers produced as a result of the remarkable dispersion obtained which gives smoothness to the film and good adhesive and covering power." (Italics ours).

This is the invention which de Stubner brought to the respondent, United Carbon Company, and which is recognized and covered by the license agreement.

**ALL SUCCESSFUL CARBON BLACK AGGREGATES  
ARE DISPERSIONS WHETHER SHAPED OR NOT,  
WHETHER DRIED OR NOT**

To prove the point we need merely quote from the opinion of the C. C. A., which says:

"While it is being cooled immediately following its production, it adsorbs natural atmospheric gases to such an extent that it sometimes occupies only 5 per cent of its own apparent volume, the rest consisting of adsorbed gases and also of gases which are free to move between the particles (occluded gases)." (Opinion, page 739, left.)

The Court then emphasizes why this is a dispersion as follows:

"In fact carbon black when originally produced is a sogasoid, i.e., a system wherein carbon black particles are suspended in a gaseous state. We might compare this sogasoid to a dispersion in that the carbon black is in a sense dispersed in natural gases." (Id., page 740.)

The opinion then says that the production of pure carbon black pellets must, as an essential step, remove the gases of the original dispersion in such manner that the dispersability of carbon black particles is preserved, for the opin-



ion says that it is the particles which constitute, when suspended in a gaseous state, the original dispersion. (Page 740.)

The essential steps are all confined to the portion of the process during which the treated particles are in the wet state, the opinion saying that it is obviously necessary to dry the moist pellets for finishing same. (page 744.)

This identical process is found in the report of Smith, dated March 5, 1935, which Smith submits to United Carbon Company on the basis of Smith's having witnessed the process in actual operation. (See February 16, 1935, letter, App. Vol. III, page 1125.)

Smith abridges petitioner's U. S. 2,086,997 which at the time of the Smith report was still in the application stage under its Ser. No. 757,913. Smith's abridgement is found in App. Vol. III, page 1142-1143. Smith says therein that two commercial processes had been demonstrated to him, the basic principles of which are included in this application, now U. S. 2,086,997.

This patent is Plff.'s Ex. 27 and is found in Vol. IV, page 1473, et seq. The title of this patent says: "Processing Pigment Dispersions" and the first sentence says that it relates to the utilization of sogasoids. The patent also shows that it is related to U. S. 1,955,738. (Id., left line 50) which Smith abridges in his report of March 5, 1935. (App. Vol. III, page 1136.)

Here Smith precisely states that this patent covers the process for *preparing* a water-wet pigment pulp *for* dispersion. The patent discloses the basic principle which is included, as Smith points out, in the U. S. 2,086,997 and discloses a process whereby from carbon black particles the original gases are removed in such manner that the carbon black remains pure and the original dispersability of the particles remains preserved.

This patent No. 1,955,738 is found in Vol. IV, pages 1450-1453. The principle governing the preservation of the nascent state is disclosed in these words.

"\* \* \* and the fine precipitated form of the pigment in the form and fineness produced by the precipitation in the first instance, is preserved and maintained without the same undergoing any treatment tending substantially to destroy or alter such fineness." (Id., page 1451, left lines 60-65.)

The removal of the original gases of the original dispersion in a manner whereby remains preserved the original dispersability, i.e., without adding any created dispersability if such a thing were possible, is disclosed in the following words:

"In carrying out this improved process I may disperse carbon-black in water, preferably warm, in order to facilitate the escape of air therefrom which tends to cause agglomeration of the pigment particles or contamination or discoloration of certain other pigments such as lead pigments, etc. The air is formed by condensation on the black pigment during cooling in its process of manufacture. The amount of water is governed by the quantity required to make a sludge of the consistency of heavy cream. The dispersion is considered complete when no more clusters or conglomerates of pigment particles are any longer noticeable substantially larger than those precipitated from a fluid state such as a gas as above indicated." (Id., page 1452, left lines 8-23.)

And again this principle is found in the first step in Claim 7 in the words:

"\* \* \* dispersing the carbon-black in water in a state of subdivision substantially the same as that produced by precipitation of the carbon black by the method of incomplete combustion of a suitable inflammable gas \* \* \*." (Id., page 1453 right, lines 125-127.)

Neville testifies that there is no dispersing agent found in this process. (Orig. Tr., page 1391.)

We call attention to the fact that the resultant pulp or intermediary dispersoid of petitioner's U. S. 2,086,997 are not finished or ultimate dispersions but are prepared pigments which is expressed by the language:

"The present invention has for its object the utilization of sogasoids to form intermediary dispersions \* \* \*." (Id., page 1473, left lines 21-23.)

This patent states that such a dispersoid is suitable for processes disclosed in U. S. 1,955,738. (Id., page 1475, left, lines 44-48.) The reason therefor is the basic principle which we have described, *supra*, and which underlies also the process (patented by Claim 3) of this patent, U. S. 2,086,997, namely, to leave unaltered the nascent state of the pigment. While the earlier patent removes the original gases by warm water in its liquid state the later patent removes these gases by the vapors of liquids including water. The process is disclosed as follows:

"According to the laws of physics gases are completely miscible in and with each other. The laws of vapors are somewhat similar to the gas laws in this respect and for this reason the vapors of the pyridine in this example mix perfectly with the adsorbed gas film around the carbon particles, and when condensation of the pyridine vapors into the liquid phase takes place the air escapes and the liquid pyridine can reach the exposed carbon particle to completely wet it and thus forms a pulp or intermediary dispersoid ready for conversion into the final and ultimate end or consumer product." (Id., page 1475, left lines 28-40.)

The object of this treatment (in both patents) is as stated by Smith in his report dated March 5, 1935, to obtain " \* \* \* a more thorough 'wetting' that is, the impregnating of the

surfaces of each of the solid particles \* \* \*." (App. Vol. III, page 1128[b].)

Such treated particles *ex necessitate* form aggregated particles for the law of molecular attraction of surfaces is operative.

Respondents' witness Cochrane testifies:

"When water wets carbon black it pulls it together and makes it into aggregates." (Original Tr., page 1093, bot.)

Respondents' witness Neville corroborates Cochrane. (App. Vol. II, page 808, last paragraph.)

The Binney and Smith Company printed the patent number of the Wiegand and Venuto patent which it owned on the shipping containers, thereby serving notice of infringement. (Swartz, Original Transcript, p. 1127.)

Smith in his report of March 5, 1935, describes aggregated particles.

He there says that the products are "unique," (Vol. III, 1551, bot.) and describes their features as distinguishable from the products offered by competing companies, that de Stubner's patent situation as to processed carbon blacks from a product point of view becomes a defensive weapon. (App. Vol. II, page 1153.) United at that time had under commercial test several thousand pounds of extrusion aggregates (Plff's. Ex. 62) and Smith's sole purpose for coming to Charleston was to give to both Nelson and de Stubner his opinion regarding any patent legal risks involved, i.e., whether or not to expand into large scale manufacture.

Swartz testifies to the report of Smith:

"That is a statement that was prepared by Mr. Smith as Mr. de Stubner's attorney, to give us a picture, not only of the then status, but of the potenti-

alities of the de Stubner patent situation, in order to enable us to determine whether or not we wanted to go on with the de Stubner business.

“Mr. Stone: We ask that this paper be introduced in evidence, the same being dated March 5, 1935.” (Orig. Tr., page 889.)

United did go on—the uniqueness of the products was challenged in the suit of *Binney and Smith Co. v. United Carbon Co., et al.*, in the United States District Court for the Southern District of West Virginia. Judge Barksdale in his opinion in this case held that the products were distinguishable as to degrees of purity, porosity and size. *Binney and Smith Co. v. United Carbon Co., et al.*, 37 Fed. Supp. 779.

The thorough wetting of carbon black particles as stated by Smith in the March 5, 1935, report, *supra*, is the result of impregnating of the surfaces of each of the solid particles (App. Vo. III, page 1128); and aggregate formation of such surface treated solid particles necessarily follows. (Testimony of Neville, App. Vol. II, page 808.)

### **Exposed Surfaces Cause Particles to Adhere and Form Proper Aggregates**

The utilization of the principle of a thorough wetting of the surfaces of the carbon particles is patented to de Stubner by the grant of Claim 3 of his U. S. 2,086,997. (App. Vol. IV, 1476.)

This claim is based on the process disclosed in the body as follows:

“\* \* \* the exposed carbon particle is completely wetted.” (Id., page 1475, left lines 37-38.)

(2) This wetting results from displacing the adsorbed gas film around the carbon particles as well as causing the total air to escape. (Id., lines 34-37.) (Gases which are

not adsorbed are defined by the opinion as "occluded gases." Opinion, page 739, left.)

In fact there is no sharp dividing line between the two kinds of gases because according to the gas laws, gases expand into each other indefinitely. The situation between adsorbed gases and occluded gases is comparable to the relation of the wool of a sheep to its skin or of the feathers of a chicken to its skin, the skin representing the adsorbed gas and the wool or feathers representing the occluded gases, so when the skin is removed the wool or feathers are inevitably removed also.

(3) This treatment preserves dispersability: " \* \* \* the carbon black particles are *dispersed* in and wetted by the condensed liquid." (Id., page 1476, end of claim 3.)

Result: The finely divided character of the particles is preserved in the pulps or the intermediary dispersoids which are not ultimate products. (Id., page 1475, left lines 38-40.)

This process Smith witnessed early in February, 1935. He testifies:

"There was some preliminary treatment to the pigment, I might say so as to make it what we call an intermediate pulp, \* \* \*." (App. Vol. II, page 869, top.)

### **Thorough "Wetting" of the Particles and the Teegerstrom Patent**

Smith is architect of the Teegerstrom patent as well as of the other "fingerprint" patents, the "fingerprint" application and the "fingerprint" reissue of the Grote patent. He testifies:

"\* \* \* while the substance in all of these applications were given to me by these men, the language in each instance was my responsibility." (Id., page 893, bot.)

Smith most carefully conceals from the Court his true understanding that "wetting" means surface treatment of particles and when testifying offers his pseudo-familiarity with this term instead of his true understanding. Smith says:

"The term is one of general use signifying a material or an agent which wets something." (Id., page 890.)

Smith repeats this pseudo-familiarity. (Id., page 894.)

In the above expression Smith uses a general expression which is virtually meaningless. He fails to say that the "wetting" means the surface treatment of particles, as stated in his report of March 5, 1935, to United Carbon Co., "a more thorough 'wetting', that is the impregnating of the surfaces of each of the solid particles." By this failure he makes more striking the contrast between his testimony and the above report.

As did the opinion, so shall we address ourselves primarily to the Teegerstrom patent to locate petitioner's intellectual property which petitioner claims in Claim 18 of his application Ser. No. 757,469 and also in Claim 3 of his U. S. 2,086,997.

While prosecuting Claim 18, *supra*, Smith analyzes the whole de Stubner patent situation in his March 5, 1935, report, *supra*, and says:

"\* \* \* a more thorough 'wetting', that is the impregnating of the surfaces of each of the solid particles with the selected dispersion medium." (App. Vol. III, page 1128 under [b]).

Claim 18 (Id., page 1118) is directed to causing aggregated particles, dispersed in liquids or in the form of a paste to become deformed by forcing an unshaped mass of yielding aggregate through a plurality of small apertures.

Defendants' witness Neville testifies that particles be-



come aggregated when making contact between them. (App. Vol. II, page 808, bot.)

Defendants' witness Cochrane testifies:

"When water wets carbon black it pulls it together and makes it into aggregates." (Orig. Tr., page 1093, bot.)

The pulling it together is the process whereby the contact of Neville's testimony is made.

Petitioner, in his application Ser. No. 757,469, puts it in these words:

"\* \* \* to utilize the strength of the thin film resulting from the molecular attraction exerted between the contacting surfaces of the immiscible substance \* \* \*." (Vol. III, page 1111 as the basis for his Claim 18 [the aggregate claim] Id., page 1118.)

Smith, when preparing the claims for the Teegerstrom patent 2,118,059 (Vol. IV, page 1497) says: "The process of forming readily dispersible but substantially dustless carbon black particles which comprises *wetting* dusty carbon black with substantially equal amounts by weight of water, working the *wetted* mass to form a substantially homogeneous paste in which the *wetted* carbon black particles are substantially uniformly distributed \* \* \*."

This claim of Teegerstrom is based upon the specification in the body of the patent where is said:

"The relative proportions of liquid and solid are preferably such as to form a paste or *wet* plastic mass which may be formed into the desired form of aggregated particles." (Id., page 1496) (Emphasis ours.)

Smith has transferred petitioner's invention into the Teegerstrom patent, as will be seen from the following:

(1) Petitioner provides a mass of yielding aggregate in the form of pastes or solids dispersed in liquids which he forces through a plurality of small apertures. (App. Vol. III, Claim 18 of Plff.'s Ex. 34, page 1118.)

Teegerstrom provides a mass of aggregated particles comprising a liquid and a solid to form a paste. (App. Vol. IV, page 1496, left lines 12-15) and forces the paste through a plurality of pelleting openings. (Id., right lines 46 and 47.)

(2) Petitioner's small apertures are of predetermined size. (App. Vol. III, page 1111, first paragraph.)

Teegerstrom says: "Pellet size is controllable by the size of the pellet openings." (App. Vol. IV, page 1497, left lines 14-15.)

(3) Petitioner is granted Claim 12 for removing water with conditioned air. (App. Vol. IV, page 1463.) Said air is conditioned by heating it under pressure. (Id., page 1458 right lines 100-103.) The air is heated. (Id., line 108.)

Teegerstrom dries the pellets with heated air under pressure. (Opinion, page 744.)

(4) Petitioner uses heated air under pressure as a control system which permits a calculation of the time in which all or any desired quantity of the water may be removed. (App. Vol. IV, page 1458, right lines 117-124.)

Teegerstrom adjusts proper time for the drying step which controls the operation throughout the entire process. (Id., page 1497, left lines 9-12.)

(5) Petitioner's demonstration at Bullitt Street included "a problem which consisted of 'Drying' a pigment pulp of 75% water content" as shown by the Exhibit 25 of defendants, dated August 10, 1934. (App. Vol. III, page 1070.)

Under date of November 2, 1934, petitioner received a dryer on the screen principle. (App. Vol. V, page 1644.)

On or prior to November 13, 1934, the "Drying" problem has been solved; petitioner has produced "Dispersions of Carbon Black in dry and dustless form." (App. Vol. III, page 1105 under C.)

*Nota bene*, that the statement "on or prior to November 13, 1934" *supra*, is made because Nelson inquires as to progress in his letter to petitioner dated November 13, 1934, (Id., page 1102) and petitioner's reply thereto, dated November 14, 1934 (Id., page 1103) contains the information that the "Drying" problem was solved.

Teegerstrom implies that it was he who solved this problem when testifying:

"Our drying problem was a major problem there; that was a major problem." (Vol. II, page 770, bot.)

His problem was indeed solved by a dryer which operates on the screen principle as shown by Defts.' Ex. 129. (App. Vol. IV, page 1400.) But the "fingerprint" patent issued to Hanson-Skoog and applied for on April 29, 1938, which is the application date also of the "fingerprint" patent to Teegerstrom, shows that "the conveyor drier comprises a screen in the form of an endless belt \* \* \*." (Id., page 1504, left lines 14-15.)

Swartz testifies to Hanson's activities. (Vol. II, page 712):

"He was rather frequently at the Bullitt Street laboratory. It was my understanding that he co-operated with Mr. de Stubner in the installation operation of the machinery there and I know, at least that much \* \* \*."

(6) Petitioner's patent provides for the wetting of the bulk (mass) by wetting the particles. (App. Vol. IV, page 1476 lines 37-39, left)

Teegerstrom claims wetting the dusty carbon black

(mass) by wetting the particles. (Id., page 1496 left, lines 45-46.)

(7) Petitioner's process is based on obtaining the carbon black particle completely wet. (Id., page 1475, left lines 37-38.)

Teegerstrom's process is based on thorough wetting of the particles. (Id., page 1496 left lines 45-46.)

(8) Petitioner's process is based on the displacement of the adsorbed gas film around the particle. His result is a pulp (unshaped mass) or the intermediary dispersoid. (Id., page 1475, left lines 33-40.)

Teegerstrom's process is based on "displacing readily the gases adsorbed on the carbon black particles." (Id., page 1496, right lines 36-38.) Teegerstrom likewise obtains his particles free from gases prior to shaping them into pellets, (Id., left, lines 22-26) where he says:

"After the gas has been expelled, the particles are formed \* \* \*."

(9) Petitioner's process is for wetting "by the condensed liquid" (Id., page 1476 left, last line of Claim 3), which claim is based on the condensation of vapors into the liquid phase. (Id., page 1475, left lines 34-36.)

Teegerstrom obtains wetting by "admixing the powder and the vapor phase of the liquor, after which the vapor is condensed and the powder thereby wetted." (Id., page 1496, left, lines 6-8.)

### **Structure is the *Conditio Sine Qua Non* of the Process for Making Proper Aggregates**

Petitioner discloses in his application Ser. No. 757,469, which is filed under date of December 14, 1934, and is in this record as Plff.'s Ex. 34 (Vol. III, page 1109 et seq.) that it is *internal structure* which is *form-sustaining* but yield-

able to stresses imposed thereon that imparts to compounds the physical characteristics of plastics. (Id., page 1114.)

On this disclosure, *inter alia*, are based his Claims 7 and 18 which are found on pages 1115 and 1118 of Vol. III.

It is important to know that the aggregate structure which is microscopic is already in the properly wetted carbon black—drying does not impart structure.

Skoog informs the Court on this most important behavior, when testifying to pellets:

“The drying itself does not change them; they are virtually the same when they come out of the dryer.” (Vol. II, page 780, bot.)

We now find petitioners invention in all of the “fingerprint” patents as follows:

(1) Teegerstrom uses a “wet plastic mass which may be formed into the desired form of aggregated particles.” (Vol. IV, page 1496, left lines 13-15.) His pellets retain the original “internal structure.” (Id., page 1495, right line 15.)

(2) Hanson-Skoog (extrusion process) use a “wet plastic mass \* \* \*” (Id., page 1503 left, lines 10-13) and their pellets retain the original “internal structure.” (Id., page 1502, right, first line.)

(3) Skoog-Bradford use “a plastic mass of the dry flocculent powder which has been wetted \* \* \*.” (Id., page 1491, right lines 38-40.) They retain structure. (Id., left, line 48.)

(4) Hanson-Skoog (spherical pellet process) use a “wetted mass of carbon black,” (Id., 1508, right, lines 16-17) and retain “structure.” (Id., page 1507, right, line 10.)

(5) Respondents’ advertisement in the trade paper, “India Rubber World,” (Vol. I, page 278) is read into the

record on page 280 and shows they retain structure, as follows:

**"Kosmobile 66 and Dixiedensed 66"**

"These brands of gas black are free flowing, offering superior advantages in clean handling and reducing to minimum the possibility of flying dust, in mixing with rubber on the mill. They are new types of dustless carbon of irregular shape, with a structure sufficiently strong to withstand handling but of such texture as to insure immediate disintegration when subjected to the action of the Banbury Mill. Besides their dustless characteristics they have excellent processing reinforcing properties for rubber compounding and are manufactured under rigid control to assure high uniformity in physical and chemical characteristics."

**Smith transfers the petitioner's invention for the "wet and dry" process as disclosed in petitioner's confidential notebook into the "fingerprint" application of Hanson-Skoog, Ser. No. 205,139, filed April 29, 1938 (App. Vol. IV, page 1491, end of first paragraph).**

The process for using preliminarily wetted carbon black particles to which are caused to adhere dry carbon black particles by the function of the law of absorption, is disclosed in petitioner's confidential notebook entry dated April 11, 1938, (App., Vol. V, page 1663) where it appears that 6½ lbs. of carbon black were wetted with ½ gal. of hot water in the heated 5-gal. mixer. The third addition of dry carbon black absorbed the water so as to become wetted from already wetted carbon black particles as distinguished from free water.

We now find this "wet and dry" process in the fingerprint" application of Hanson-Skoog. (App. Vol. IV, page 1493, left 7-12.)

The *modus operandi* of the "fingerprint" "wet and dry" process is disclosed (Id., page 1492, right side, last parag.) and states that *wet* spherical agglomerates are made as the initial step. (Lines 54-58.)

Thereafter dry carbon black is caused to adhere to the wet particles and to absorb moisture from the wet pellets. (Id., page 1492, right, lines 70-75.)

Upon the trial petitioner was denied the right of access to this "fingerprint" application. (Original Tr., page 361, et seq.)

Grote reissue patent is another "fingerprint" patent. (App. Vol. IV, page 1517.)

Smith is found again to be the transfer agent of petitioner's property rights to "wetting" as surface treatment and hence aggregate formation, when he obtains for Grote the reissue patent in the manner which he describes in his testimony. (Vol. II, page 894.) Here Smith refers again to his familiarity with the term "wetting agent." He again succeeds in his concealment of his true understanding of "wetting as surface treatment" and grafts this upon the original Grote patent.

Smith, answering the Court's question with reference to petitioner's process of his application 757,469, says "I never saw the process demonstrated." (Vol. II, page 899.) Yet, in his report to Microid Process, Inc., dated February 3, 1939, which begins on page 1565 of App. Vol. V, Smith states with reference to this application:

"The process was tried experimentally at the Bullett Street laboratory by Mr. de Stubner and appears to have commercial possibilities in several fields, although not now used as far as is known. The art is close and only possible patent coverage will be narrow. Former interviews with Examiner indicate a willingness to reconsider the final rejection



and to allow specific claims if supported by affidavit of Mr. de Stubner. Such amend't and affidavit should be prepared shortly and filed in the case."

We submit that the Smith report of March 5, 1935, *supra*, covering "the de Stubner Patent Situation" (App. Vol. III, page 1126 et seq.) and especially page 1128 under (b) and page 1142 bottom and 1143 where he says: "the basic principles \* \* \* in both of the commercial processes which were demonstrated by Dr. de Stubner to the writer \* \* \*" when compared with the testimony of Smith that he used no material in the "fingerprint" patents which was derived from de Stubner (Vol. II, page 896) cannot be reconciled. This testimony of Smith is accepted and relied upon as true by the trial court and also affirmed by the Circuit Court of Appeals.

**The "Dry and dustless Carbon Black Dispersions" of petitioner on or prior to November 13, 1934, and the resultant of the Teegerstrom process are identical.**

The opinion says that the causes for dustiness is the natural atmospheric gases which are adsorbed on the carbon black while it is being cooled and other gases are mixed with it which move between the particles. (Opinion, page 739, left, bot.)

The opinion says that the resultant is the original dispersion and goes on to say that "water when mixed with carbon black eliminates the gases." (Opinion, page 743, right top.)

Petitioner when making the dry and dustless carbon black dispersions (App. Vol. III, page 1105) starts with the "original dispersion" (sogasoid), mixes it with water to eliminate gases and then places it in the dryer. While this treated carbon black is being cooled in the atmosphere the laws of condensation are operative and air at normal temperature condenses wherever it finds the space. Petitioner's

patent U. S. 1,965,764 which was under demonstration at the Bullitt Street Plant says that the air is caused to bubble through the product to be dried, thus leaving channels or making the dried product porous. The pores are the spaces within which the gases become condensed, i.e., being adsorbed and occluded. (App. Vol. IV, page 1458, line 144.)

This product is in reality a dispersion such as the opinion describes as a sogasoid, i.e., a system wherein carbon black particles are suspended in a gaseous state. (Opinion, page 740, left top.)

It is for this reason that de Stubner names the resultant of his process "Dispersions" of carbon black in dry and dustless form. (Vol. III, page 1105, under c.)

The opinion says that Teegerstrom eliminates the gases (both adsorbed and occluded) by mixing carbon black with water and then dries the pellets with heated air under pressure. The Teegerstrom patent says the heated air for drying is forced "over and through the mass." (App. Vol. IV, page 1496, right lines 65-66.) Here we have the cause for channels which make the dried product porous and under such conditions the law of condensation causes air to fill all spaces not excepting the porous exterior of the pellet. The openings or pores in the exterior cause communication of the interior pores or interstitial spaces with the atmosphere.

We submit no difference can be pointed out between the original dispersion which is bulky and the treated dispersion which is less bulky, except as to the amount of gases retained by the treated black while it is being cooled, thus becoming a treated dispersion.

We submit that the resultants of the operativeness of the laws of condensation in the Teegerstrom process as well as in petitioner's process can not be distinguished the one from the other. Whereas, the opinion says:

"We believe that the processes are clearly distinguishable." (Page 744, right.)

To prove the point we need merely put them both to the test. de Stubner states that the de Stubner dry and dustless dispersions belong to the family of reversible colloids and therefore disperse completely upon contact with water. (App. Vol. IV, page 1105, last paragraph.)

Teegerstrom characterizes the resultant of his process as being readily broken up to make the dustless particles available for dispersion in the dispersion medium, for example, as water. (App. Vol. IV, page 1497, right top.)

We submit that if the sogasoid of dusty carbon black is a dispersion, then it inevitably follows that the pellets produced by the process described in Teegerstrom's patent are likewise dispersions.

### DEVASTATING RESULT OF ERROR

The acceptance and adoption of the erroneous term of "microscopic" for the correct term "macroscopic" as used by petitioner in his application No. 757,469, is the apparent cause for the conclusion reached by the Circuit Court of Appeals in affirming the opinion of the District Court. The C. C. A. opinion, page 744, says:

"We believe the processes are clearly distinguishable, and to prove the point we need merely quote from plaintiff's language in this very application as follows:

"\* \* \* the resultants of the former are usually three dimensional *microscopic* bodies \* \* \*."

(Italics ours.)

The District Court in its opinion (App. Vol. I, page 149) quotes two sentences, pages 5 and 6 of the application, and then in its discussion of petitioner's testimony concerning the extrusion process says:

“\* \* \* plaintiff knew it has no relation and that his attempt on the witness stand to show otherwise *was a deliberate fraud on the Court.*” (App. Vol. I, page 149.) (Italics our.)

Smith three times reads this error of microscopic instead of macroscopic into the record, (App. Vol. II, pages 900-901.) when purporting to read from page 6 of Plaintiff's Exhibit No. 34. Respondents' witness, David D. Cochrane, testifies from this identical file wrapper (Certified by U. S. Patent Office) correctly, using the term *macroscopic*. (Original Tr., pages 1110 and 1112 bot.) The devastating characterization of petitioner by the District Court finds no justification in this record.

We submit that the answers of respondents' witness, A. M. Smith, to the trial court's inquiries concerning the form-sustaining structure produced by the extrusion methods (App. Vol. II, page 896 et seq., and especially page 901), cannot be reconciled with the principles disclosed in petitioner's application Ser. number 757,469, prepared by Smith and filed December 14, 1934, (App. Vol. III, page 1109, et seq., and especially page 1114) wherein is disclosed the principle of the process of the invention and the mechanical device and apparatus for use therewith, for obtaining a colloidal dispersoid of an internal structure of fine subdivisions of solid particles which is form-sustaining. This is reflected in Claims 7 and 18 in said application. (Id., pages 1115 and 1118.)

### CONCLUSION

We submit that there is highly prejudicial error in the decision of the Circuit Court of Appeals for the Fourth Circuit in affirming the findings of the District Court.

First: " \* \* \* that there was no error in the findings of the court below that the agreements of August 18, 1936, were not intended to and did not cover the field of carbon black." (Opinion, page 741.)

Second: That the plaintiff did not disclose to the defendants the processes covered by their patents and that he is not entitled to an assignment of the patents or to royalties upon the defendants' use of the processes therein described. (Opinion, page 745.)

Third: That the plaintiff was not in possession of information which enabled the defendants to secure the dustless carbon black patents or to engage in the successful manufacture of the products. (Opinion, page 745.)

We further submit that petitioner could not use, nor could he license others to use, his inventions, processes or discoveries, whether patented or unpatented, which related to the treatment of carbon black or other pigments produced by combustion or decomposition of hydrocarbon gases, petroleum or petroleum products and lamp black, upon which as a physicist he had expended money and labor during many years, without incurring liability under his license agreement.

We further submit that documentary evidence establishes the fact that respondents have used, and are using, petitioner's processes as disclosed to them in his patents and writings, in violation of the terms of the license agreement; that plaintiff is entitled to have and receive under the license agreement one-sixth of what may be determined to be a reasonable royalty after the cancellation of the

license to Microid Process, Inc. (App. Vol. I, page 51.)  
Microid, as lessor, was to receive one-half of what was  
to be determined as a reasonable royalty. (Id., page 46 [d]).

Respectfully submitted,

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